

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1227

To be argued by
JOHN D. GORDAN III

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1227

IN THE MATTER

—of—

EVELEN WILLIAMS, ESQ.,
Contemnor Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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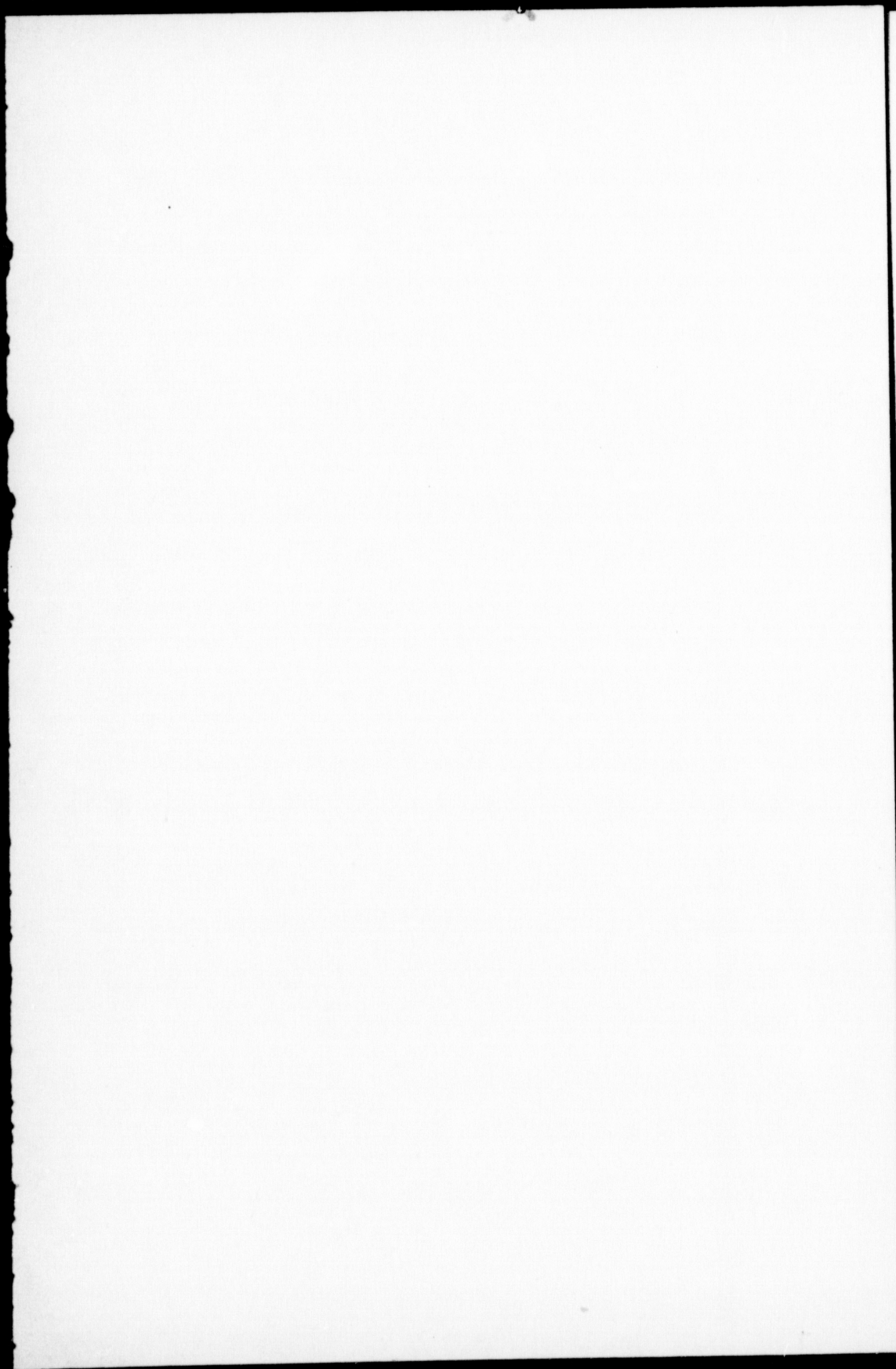


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1227

IN THE MATTER

—of—

EVELYN WILLIAMS, Esq.,

Contemnor-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Evelyn Williams, an attorney, appeals from a judgment entered January 3, 1974, in the United States District Court for the Southern District of New York, summarily convicting her of criminal contempt of court for her conduct during the jury trial before the Honorable Lee P. Gagliardi, United States District Judge, of *United States v. Chesimard and Hilton*, 73 Cr. 572. 18 U.S.C. § 401(1); Fed. R. Crim. P. 42(a).

Miss Williams was held in contempt of court on December 5, 1973, during the course of the trial. On December 18, 1973, after the trial had ended, Judge Gagliardi filed an order of contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure. On January 3, 1974, Miss Williams was sentenced to 10 days imprisonment.

Execution of the sentence has been stayed pending this appeal.

Statement of Facts *

On May 13, 1973, Indictment 73 Cr. 572 was filed in the United States District Court for the Southern District of New York, charging Joanne Chesimard, Freddie Hilton and Avon White in three counts with armed bank robbery and conspiracy. 18 U.S.C. §§ 2113 and 371.

In August, 1973, Chesimard, who had been apprehended by New Jersey state authorities, was arraigned on the indictment in the Southern District of New York, and shortly thereafter a notice of appearance on her behalf was filed by Evelyn Williams, the appellant.**

On September 26, 1973, at a pre-trial conference, Miss Williams "... requested" a postponement of proceedings in the Southern District to allow for preparation of a defense to state murder charges brought against her client in New Jersey and then scheduled to come to trial on October 9. At the same time, counsel for Hilton renewed a prior motion for severance and an immediate trial. The Government, fearing unnecessary duplication of effort, opposed severance, and the court denied it. Late in October, a mistrial was declared in the New Jersey murder trial and the retrial was postponed until January 2, 1974. However,

* The record of this case establishes, as Judge Gagliardi noted in his order of contempt, that Miss Williams' conduct throughout the proceedings was deliberately obstructive and contemptuous. It is not possible to set out in detail all of misconduct which proves the accuracy of Judge Gagliardi's statement. We therefore respectfully urge the Court to examine the record of the proceedings in this case on November 27 and 28 and December 4 and 5, 1973.

** Freddie Hilton was arrested for the bank robbery prior to the filing of the indictment and remained in custody awaiting trial in default of \$250,000 bail. Avon White was apprehended on other charges after the filing of the indictment and was arraigned on the indictment in the Southern District of New York on September 26, 1973.

Judge Gagliardi was not advised of that fact and he apparently did not find out about it until on or about November 27, 1973, just prior to a conference, which Chesimard's attorney did not attend although she had been directed to do so."* At the conference on November 27, Judge Gagliardi fixed the trial for the following day (11-27-73 Tr. 16-28).**

The next day, November 28, Miss Williams did appear, offered no reason for her failure to appear the day before or her failure to advise the Court of the postponement of the New Jersey trial and simply argued that the trial in the Southern District of New York should be adjourned until the completion of the New Jersey proceedings because she was not ready to proceed. Her application was denied, and the trial was rescheduled for the morning of December 3, 1973, five days later (11-28-73 Tr. 1-12).

On November 30, 1973, Chesimard, by order to show cause, petitioned this Court for a writ of mandamus directing Judge Gagliardi to postpone the trial. The petition was denied after argument on December 3, 1973. *Chesimard v. Gagliardi*, 489 F.2d 271 (2d Cir. 1973).

Proceedings before the District Court the next day, December 4, began with the late arrival of Miss Williams, who pointed out that this was the first time she had been late, for on the prior occasion when she had not appeared "... it was not not on time; it was not at all" (12-4-73 Tr. 2-3). Miss Williams then proceeded to reargue her motion to adjourn the trial, which was denied (12-4-73 Tr. 9-11). Counsel for Hilton made numerous lengthy applications, which were also denied. Miss Williams then again

* *Chesimard v. Gagliardi*, 489 F.2d 271, 272 (2d Cir. 1973) [footnotes omitted].

** Citations to "Tr." preceded by a date refer to the transcript of proceedings in the District Court on that date. The transcripts of those proceedings on November 28 and December 4 and 5 are in the Appellant's Appendix (hereafter "App.").

asked for an adjournment, this time on the grounds that she had not completed making motions; the application was denied (12-4-73 Tr. 35-39). Chesimard then began to interrupt the proceedings, and the Court took a recess, requesting Miss Williams to advise Chesimard how to comport herself in the courtroom.

After the recess, a jury panel was summoned to the courtroom, but, as the jurors were being called, Chesimard again interrupted the proceedings with a protracted outburst (12-4-73 Tr. 41-43). The trial judge directed the Marshals to remove Chesimard, and this was accomplished with following commentary by Miss Williams (12-4-73 Tr. 43-44):

"Miss Williams: Don't you put your hands on her. This is a sick woman. Now, if you want her to leave, she can leave. You don't have to grab her like a god-damned animal.

The Court: Marshals—

Miss Williams: The woman is sick.

Defendant Chesimard: This is injustice. It's not right.

Miss Williams: Don't you put your hands on her."

After further colloquy between the Court and defense counsel, in which Judge Gagliardi succeeded, despite Miss Williams' frequent interruptions, in explaining to her that Chesimard could remain in the courtroom only if she did not interrupt the proceedings, Chesimard was brought back to the courtroom. Judge Gagliardi, after some wholly unnecessary interruptions by Miss Williams, carefully admonished Chesimard and Hilton of the importance of their being orderly so that they might remain in the courtroom to assist their attorneys (12-4-73 Tr. 45-53). The trial was then recessed for lunch.

After the luncheon recess, the trial judge read to the defendants a lengthy excerpt from *Illinois v. Allen*, 397 U.S. 337 (1970), urged them to behave properly, and then summoned the jury panel (12-4-73 Tr. 57-63). No sooner had the jurors entered the room than Miss Williams rose to announce that Chesimard was not going to proceed with the trial because of the "absolute refusal of the Court to grant her her basic constitutional rights", a statement which was followed by a lengthy outburst from Chesimard (12-4-73 Tr. 63-64). The Judge then ordered Chesimard removed, Hilton interrupted and was also removed, and the jury panel was sent out. Judge Gagliardi then had the defendants brought back to the courtroom and again painstakingly implored them to behave, but further outbursts by both of them again required their removal (12-4-73 Tr. 67-73). Impaneling of the jury commenced anew, and after twelve prospective jurors were in the box, Judge Gagliardi had the defendants brought back to the courtroom. Chesimard immediately began a further outburst. The trial judge then asked Miss Williams whether she wished Chesimard ". . . in court, silenced in court, or outside?" (12-4-73 Tr. 73-77). Miss Williams responded, "I am requesting an adjournment" (12-4-73 Tr. 78). The disruptions by Chesimard and Hilton continued, and they were removed. After further inquiry of Miss Williams as to her preferences and her continued refusal to answer his question, Judge Gagliardi ruled that Chesimard would be excluded from the courtroom until she agreed to comport herself properly (12-4-73 Tr. 81-82). Miss Williams responded: "And I am advising the Court that I will not participate under this gag rule decision of this Court without the presence of the defendant . . ." (12-4-73 Tr. 82). Miss Williams then attempted to argue further, interrupting the trial judge's remarks to the jury, and after being directed to remain seated and to limit her remarks to objections to rulings by the Court, Miss Williams announced that she would not participate further. Then, despite warnings from the trial judge that her conduct was contemptuous, Miss Williams

walked out of the courtroom, bringing proceedings to a halt for that day (12-4-73 Tr. 83-87).

The following day, December 5, the trial began again shortly after 2:00 P.M., Miss Williams having failed to be in court at 10:00 A.M. (12-5-73 Tr. 67-68). Miss Williams insisted that, despite her departure from the courtroom the day before, she continued to represent Chesimard. The trial judge, over Miss Williams' objection, appointed an attorney to be prepared to take over Chesimard's defense should that become necessary. After further colloquy, a recess was taken to permit Miss Williams to talk to Chesimard (12-5-73 Tr. 15-17). Thereafter, Miss Williams again asked for a postponement of the trial, indicating that if the trial continued ". . . I will stand mute; I will not participate in the trial" (12-5-73 Tr. 21). The application was denied. A new jury panel was produced, and the impaneling process began, only to be interrupted by a protracted outburst by Chesimard (12-5-73 Tr. 17-18, 25, 27-30). The Judge ordered Chesimard removed, and her departure was followed closely by Hilton's, whose outbursts commenced as soon as Chesimard was out of the courtroom (12-5-73 Tr. 30-32). Then a further delay took place to accommodate a request by Miss Williams to talk to Chesimard.

After this recess, the defendants were brought back to the courtroom, and Miss Williams told Judge Gagliardi that she had advised Chesimard to behave (12-5-73 Tr. 37). However, no sooner did the proceedings resume than Chesimard commenced a lengthy outburst, joined in by Hilton, and both were again removed (12-5-73 Tr. 38-44). Judge Gagliardi then explained patiently and at length to Hilton's attorney and to Miss Williams that they would be given an opportunity to discuss the situation with their clients at the end of the day and that the defendants would be allowed back in the courtroom if they agreed to comport themselves properly (12-5-73 Tr. 44-48).

Judge Gagliardi then began to address the jury panel:

"The Court: . . . Now I am going to ask the jurors—I am going to ask all of you, both those in the jury box now and the other members of the jury who are sitting in the back of the courtroom to pay careful attention to the statements that I am about to make to you and to the questions that I am going to address generally to you as well as individually to those who are in the jury box. It is entirely likely, and most probable, as we proceed here those of you who are presently seated in this box may be replaced by others who are sitting in the back of the courtroom, and rather than going through the procedure of asking those of you who take the places of the jurors in here the same individual questions, I am merely going to ask you if you have heard the statements that I have made and the questions that I have addressed to the other jurors, and if there is anything about any of those statements or any questions, or any other matter pertaining to your qualifications to sit as a juror in this case, that you should bring it to my attention——

Ms. Williams: If the Court pleases, there are no statements that have been made that I have been aware of to any jurors in this case——

The Court: Ms. Williams, I am in the process of interrogating this jury——

Ms. Williams: Your Honor, I might take exception——

The Court: Ms. Williams——

Ms. Williams: Your Honor, I am taking exception to this court's continuation of this trial without determining, first of all, in view of the defendants' position indicated by their behavior, of what your

particular attitude and what your position is going to be in relation to them——

The Court: All right——

Ms. Williams: I do not feel that it is——

Well, we will not talk about justice—I think your Honor has an obligation to make a decision.

Bring them in here gagged down and shackled, or say they will not be present in this court, so that defense counsel can know what to do, how to discuss what is happening in this case with their clients——

The Court: Ms. Williams——

Ms. Williams: Sir, I mean they are just simply out of here. It is your responsibility to make a decision.

The Court: Ms. Williams, you have made your objection. I have indicated to you that they will be removed from the courtroom, and that is the procedure I am going to follow at this time in view of their behavior. Now, please.

Ms. Williams: How are they going to understand everything that is going on?

The Court: That is a matter that they have elected by reason of their behavior——

Ms. Williams: They have not so elected——

The Court: Well, that is a legal question.

Ms. Williams: Your Honor, I state that your removal of their presence from this courtroom is basically and so elementarily unconstitutional——

The Court: Very well——

Ms. Williams: —that it is difficult for me to sit here and listen to your Honor address this panel or any other panel in relation to the legal aspects of this case——

The Court: Ms. Williams——

Ms. Williams: We are not concerned about anything that somebody——

The Court: Ms. Williams, I indicated to you before that in the event you have an objection you would make your objection on the record——

Ms. Williams: I have made it on many records, have I not?

The Court: I want no further statements, please. Will you please be seated.

Ms. Williams: Your Honor——

The Court: Ms. Williams, will you be seated.

Ms. Williams: Your Honor——

The Court: You have made your objection. Will you please be seated.

Ms. Williams: Your Honor——

The Court: Will you please be seated.

Ms. Williams: I will not be seated without the presence of the defendants whose lives, whose liberty is in jeopardy in this case without their presence in this court——

The Court: Ms. Williams——

Ms. Williams: I will not be seated and I will not listen to any statement made by this Court——

The Court: Ms. Williams, will you be quiet.

Ms. Williams: I am perfectly aware, your Honor—I am perfectly prepared to be quiet——

The Court: Very well.

Ms. Williams: —but I will not be seated.

The Court: You will remain standing if you prefer and be silent.

Ms. Williams: I will not remain standing either. I think your Honor is aware of that.

The Court: As I said, members of the jury, I want you to listen to what I have to say here—Ms. Williams—Marshal, lock that door, please. I don't want anybody to leave this courtroom.

Ms. Williams, have you elected not to—everybody remain seated, please. Everybody remain seated, please. Remain seated, please. Everybody remain seated.

Ms. Williams: I will not sit, your Honor.

The Court: Ms. Williams, are you going to continue your representation of Miss Chesimard in this case?

Ms. Williams: I will defend the Defendant Chesimard, your Honor——

The Court: I can't hear you.

Ms. Williams: I will defend the Defendant Chesimard until she, in fact, replaces me. I will not have her discussed or any presentation made as to legal matters related to her in her absence.

The Court: I direct you to return to the counsel table.

Ms. Williams: I will not return to the counsel table——

The Court: Ms. Williams——

Ms. Williams: —under these circumstances——

The Court: Ms. Williams, your failure——

Ms. Williams: —unless the defendant Chesimard is here to listen——

The Court: Ms. Williams, your failure to obey my instructions may result in your being cited for contempt.

Ms. Williams: I am aware of that.

The Court: Do you wish to purge yourself of the possibility of being held in contempt?

Ms. Williams: I will purge myself, your Honor, of nothing except a proper defense of my client.

The Court: I direct you to return to the counsel table.

Ms. Williams: I will do anything, you know, to purge myself of an improper defense of my client.

The Court: Will you return to the counsel table?

Ms. Williams: I will not, your Honor, sit at that counsel table in the absence of the defendant.

The Court: Do you have anything to say in defense of your contumacious conduct in this court?

Ms. Williams: Of the what?

The Court: Of your contumacious conduct in this court?

Ms. Williams: I do not accept your characterization of my conduct as contumacious.

The Court: I find that you have failed to obey the legal order and directive of this Court, and I therefore, hold you in contempt.

Ms. Williams, return to the counsel table.

Ms. Williams——

Ms. Williams: I heard you, your Honor.

The Court: —return to the counsel table.

Ms. Williams: I will not, unless the Defendant Chesimard is present with me at the counsel table. At that point I will return" (12-5-73 Tr. 48-54).*

On December 18, 1973, the date fixed for imposition of sentence on Miss Williams for contempt, Judge Gagliardi filed an order of contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure (App. 45a-48a). The order incorporated the entire record of the trial by reference because "no single reference or series of references to the transcript can accurately reflect the extent of Miss Williams' contemptuous conduct . . ." Judge Gagliardi found that Miss Williams' conduct was deliberately and willfully contemptuous and that she had intentionally disrupted "the proper functioning of the Court." He then adverted in the order to specific conduct of Miss Williams:

"On December 4, 1973, shortly before the conclusion of the Court's afternoon session, the defendant Joanne Chesimard was excluded from the courtroom following a series of outbursts on her part. After

* Miss Williams thereafter agreed to return to counsel table and was accorded a further opportunity to consult with Chesimard. The trial was recessed for the day.

On December 6, 1973, Chesimard was unable to come to court because of illness, and the trial was adjourned to December 10. The trial proceeded on that date and continued until December 12, 1973, when a mistrial was declared because the jury was unable to reach a verdict. During the trial the defense stood mute, and the brief periods when attempts were made to permit the defendants to remain in the courtroom were punctuated by violent outbursts which required their immediate removal.

The indictment was tried again before the Honorable Arnold Bauman, United States District Judge, and a jury between December 18 and December 28, 1973; at the conclusion of the trial the defendants were acquitted. At the trial before Judge Bauman, Chesimard was not represented by Miss Williams.

the defendant Chesimard was escorted from the courtroom, Ms. Williams engaged in a colloquy with the court concerning the exclusion of the defendant and the court's ruling concerning the form in which objections were to be made in the presence of the jury. During the course of this colloquy Ms. Williams not only took formal exception to the court's ruling but announced that she would not submit to the direction of the court in this regard. Towards the conclusion of this exchange Ms. Williams, although insisting that she continued to represent the defendant Chesimard, stated that she would not participate further in the proceedings. Having made this statement and despite the explicit direction by the court to remain in the courtroom, seated at the counsel table and a warning by the court as to consequences of her contumacious conduct, Ms. Williams left the courtroom. At the time Ms. Williams absented herself, court was in session and the jury selection was in progress. Shortly after Ms. Williams left the courtroom, the trial was adjourned until 9:30 A.M. the following morning.

Court resumed on the morning of December 5, 1973; Ms. Williams did not appear. Ms. Williams was contacted during the course of the morning and directed to be in court at 2 P.M. During the course of the proceeding, defendant Chesimard was again removed from the courtroom following a repetition of her outbursts of the previous afternoon. After the removal of defendant Chesimard, Ms. Williams again engaged in a colloquy with the court. Ms. Williams told the court that she would not listen to any statement made by the court and despite repeated direction to remain at the counsel table she made her way to the rear door in an attempt to leave the courtroom. At this juncture, the marshalls, acting at the court's direction, locked the exits to

the courtroom. The colloquy continued with Ms. Williams standing at the rear door of the courtroom. The court directed Ms. Williams to return to the counsel table; she refused. The court warned Ms. Williams that she would be cited for contempt if she persisted in her conduct; she indicated that she was aware of the possible consequences of her actions. The court offered Ms. Williams the opportunity to purge herself of her contempt; she declined. The court asked Ms. Williams if she had anything to say in defense of her contumacious conduct; she stated that she did not consider her conduct contumacious. At this point, the court held Ms. Williams in summary contempt for failure to obey the legal order and directive of the court."

The sentencing of Miss Williams was adjourned by permit her counsel, William Kunstler, Esq., to make motions to vacate the contempt citation and to assign the matter to another judge (App. 49a-52a).^{*} On January 3, 1974, after hearing both Miss Williams and Mr. Kunstler, Judge Gagliardi sentenced Miss Williams to 10 days imprisonment (1-3-74 Tr. 1-21).

^{*} The motions were denied by order with opinion filed January 8, 1974. The opinion as reproduced in the appendix (App. 73a-76a) is missing its most crucial page.

ARGUMENT

Exercise of the summary contempt power by Judge Gagliardi in this case was fully appropriate, and there was no necessity to refer the matter to another judge or to conduct additional proceedings.

On appeal from her conviction for criminal contempt of court, Miss Williams appears to argue that her right to due process of law was denied because of the refusal of Judge Gagliardi, whom she claims was "personally embroiled", to refer the contempt proceeding to another judge, and because the proceedings that were held below failed to provide her with an adequate opportunity to be heard. These contentions are wholly without merit. The record establishes that Judge Gagliardi was not "personally embroiled", that his use of the summary contempt power was fully justified by the outrageous conduct of Miss Williams, and that Miss Williams was accorded every procedural right to which she was entitled.

Rule 42(a) of the Federal Rules of Criminal Procedure authorizes a judge of a United States District Court to summarily convict and punish* any person who, in his presence, engages in conduct which disrupts the proper functioning of his court. 18 U.S.C. § 401(1). This power of a District Judge to act summarily against contempts committed in his presence existed long before its codification in Title 18 of the United States Code and the Federal Rules of Criminal Procedure. *Ex parte Terry*, 128 U.S. 289 (1888); *Cooke v. United States*, 267 U.S. 517 (1925). Whether the contemptuous conduct so impinges upon the orderly administration of justice as to warrant immediate summary action is a matter for the broad discretion of the

* The punishment imposed may not exceed six months without according the contemnor a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Bloom v. Illinois*, 391 U.S. 194 (1968).

District Court. *United States v. Meyer*, 462 F.2d 827, 843 (D.C. Cir. 1972). In any case, the District Court has discretion whether to proceed to convict and punish the contemnor immediately upon the commission of the contempt or to wait to move against him summarily until the conclusion of the proceedings. *Sacher v. United States*, 343 U.S. 1, 9 (1952); *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962); *United States v. Rollerson*, 449 F.2d 1000, 1004 n.12 (D.C. Cir. 1971); *In re Osborne*, 344 F.2d 611 (9th Cir. 1965). If a District Judge acts summarily against a contemnor at the time the contempt is committed, then it is irrelevant whether the Judge has become "personally embroiled" or not. *United States v. Meyer*, *supra*, 462 F.2d at 843; *Mayberry v. Pennsylvania*, 400 U.S. 455, 463 (1971). If, however, the District Judge waits to move against the contemnor until the conclusion of the trial, he must refer the contempt proceedings to another judge if he has been "personally embroiled" with the contemnor, *Offutt v. United States*, 348 U.S. 11 (1954), or if the acts of contempt have involved such a vilification of the Judge's person that the appearance of justice requires that he rescue himself, *Mayberry v. Pennsylvania*, *supra*, *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972). But *Offutt* and *Mayberry* state no broader rule of referral of post-trial contempt proceedings, and there is no requirement that a judge who has been neither so vilified nor embroiled must refer the contempt proceeding to another judge if he waits to move against the contemnor until the conclusion of the trial. *Sacher v. United States*, *supra*; *United States v. Galante*, *supra*; *United States v. Rollerson*, *supra*; *In re Osborne*, *supra*.

In this case, Judge Gagliardi summarily convicted Miss Williams for her contemptuous conduct at the moment that it occurred. There can be no doubt, and Miss Williams does not seriously contend the contrary, that her attempt to walk out of the courtroom while a trial at which she was

counsel was in progress and her refusal to obey the trial judge's repeated direction to resume her seat at counsel table were grossly contemptuous. E.g., *In re Cohen*, 370 F. Supp. 1166, 1175-1177 (S.D.N.Y. 1973) (Weinfeld, J.); *In re Dellinger*, 370 F. Supp. 1304, 1315-1316 (N.D. Ill. 1973) (Gignoux, J.). And while the application of the summary contempt power must be as sparing and restrained as possible *Pietsch v. President of the United States*, 434 F.2d 861, 864 (2d Cir. 1970), particularly when dealing with attorneys who seek to defend their clients fully and vigorously, *In re McConnell*, 370 U.S. 230, 236 (1962), the conduct for which Miss Williams was cited far exceeded the bounds of permissible advocacy and amounted to nothing more than an unlawful attempt to put an end to a trial which a variety of other stratagems on her part, including walking out of the courtroom the previous day, had not succeeded in stopping. There can be no doubt that Miss Williams' attempt to leave the courtroom and her refusal to return to counsel table as directed while the trial was actually in progress constituted a virtually complete obstruction of the proceedings; had Judge Gagliardi not acted as he did, the trial could not have gone forward at all. See *United States v. Seale*, 461 F.2d 345, 371 (7th Cir. 1972). Moreover, the effectiveness of Judge Gagliardi's action establishes the wisdom of his having acted as promptly as he did, for though he found Miss Williams in contempt only after she had walked out of the trial once before and was attempting to do so again in defiance of directions from the bench, the assertion of the contempt power sufficiently influenced Miss Williams into desisting from any further dramatic exits during the balance of the trial. There can be no doubt that Judge Gagliardi's immediate exercise of the summary contempt power was fully justified under the circumstances. *United States v. Meyer*, *supra*, 462 F.2d at 843.

Nevertheless, relying on *Offutt v. United States*, *supra*, *Mayberry v. Pennsylvania*, *supra*, and *In re Dellinger*,

461 F.2d 389 (7th Cir. 1972), Miss Williams claims that Judge Gagliardi was so "personally embroiled" in the misconduct which occurred that he erred in not referring the matter to another judge to hear, determine and punish. The fact of the matter, as a reading of the record makes clear, is that Judge Gagliardi was not "personally embroiled" with Miss Williams and there was no need for him to refer the contempt matter to another judge. The citations to the record upon which Miss Williams relies in her brief (at 6-8) show that Judge Gagliardi was the subject of considerable verbal abuse from Chesimard, who called the Judge "corrupt", "bigoted", "a racist" and "an agent of the CIA".* While it is questionable that these epithets fall into the category of "fighting words"—'dirty sonofabitch', 'dirty tyrannical old dog', 'stumbling dog' . . . 'fool' . . . 'Go to hell'" which the Supreme Court held required a reference to another judge for a contempt proceeding not commenced until after trial, *Mayberry v. Pennsylvania*, *supra*, 400 U.S. at 466, the important fact is that these insults came not from Miss Williams, the contemnor, but rather from Chesimard, a distinction Judge Gagliardi properly emphasized in his opinion denying the motion to transfer the matter to another judge. And there is no suggestion in Miss Williams' brief or in the record that the trial judge attributed Chesimard's conduct to Miss Williams; indeed, the record establishes the contrary, for in his many patient attempts to prevail on Chesimard to be orderly in the courtroom Judge Gagliardi never suggested that it was Miss Williams' responsibility to keep Chesimard under control (e.g., 12-4-73 Tr. 39-40, 71, 76), and Chesimard herself told the Judge that Miss Williams had indeed instructed her to remain quiet in court (12-5-73 Tr. 28).

*It is unlikely that Chesimard's repeated accusation that Judge Gagliardi had shown favoritism to Mitchell and Stans caused him more than wry amusement. *Stans v. Gagliardi*, 485 F.2d 1290 (2d Cir. 1973).

Similarly, an examination of the exchanges between the Court and Miss Williams throughout the proceedings below hardly discloses the kind of hostility and bias on the part of the trial judge and the provocation of the contempt by judicial misconduct that required referral of the contempt proceedings, begun at the conclusion of the trial, to another judge in *Offutt v. United States*, *supra*. It does not overstate the point to say that Judge Gagliardi's conduct was a model of judicial restraint in the face of difficult and unusual circumstances. And while there can be no doubt that Miss Williams was "disruptive, recalcitrant and disagreeable", her misconduct, serious though it was, did not involve "an insulting attack upon the integrity of the judge carrying such a potential for bias as to require disqualification." *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964). If any doubt of the patience, restraint and fairness with which Judge Gagliardi greeted Miss Williams' misconduct during the trial could survive a reading of the record, it would be dispelled by the extremely lenient sentence imposed upon Miss Williams for that misconduct. *Mayberry v. Pennsylvania*, *supra*, 400 U.S. at 469 (Mr. Justice Harlan, concurring); *In re Osborne*, *supra*, 344 F.2d at 616.

Moreover, although the record is so clearly to the contrary the point need scarcely be raised, even if Judge Gagliardi had been "personally embroiled" with Miss Williams, no referral of the matter to another judge was warranted because Judge Gagliardi convicted Miss Williams of contempt at the moment that her contemptuous acts occurred. *United States v. Meyer*, *supra*, 462 F.2d at 843; *Mayberry v. Pennsylvania*, *supra*, 400 U.S. at 463. The cases in which referral to another judge had been required, *Mayberry v. Pennsylvania*, *supra*; *Offutt v. United States*, *supra*, *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972), have all concerned citations at the conclusion of trial for contemptuous conduct during the trial, which is not what occurred here.

While to be sure Judge Gagliardi did not punish the contempt immediately, that fact does not require a different result, since the cases in which personal embroilment has required reference to another judge have all involved situations in which, in contrast to this one, there has been no citation for contempt contemporaneous with the offensive conduct. See *Weiss v. Burr*, 484 F.2d 973, 982 and n. 15 (9th Cir. 1973).

Miss Williams also complains, relying on *United States v. Wilson*, 488 F.2d 1231 (2d Cir. 1973), *cert. granted* — U.S. — (May 13, 1974), that she was entitled to a hearing, apparently on the question whether her conduct was contemptuous. However, *Wilson* is wholly inapposite, for it is concerned with the requirements for a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure. Miss Williams' contemptuous conduct was treated under Rule 42(a), which requires no such hearing and properly so, for what happened in this case establishes how important it is for District Judges to have the power to act immediately and summarily against wilful conduct which completely disrupts judicial proceedings. Moreover, since Miss Williams' misconduct occurred in Judge Gagliardi's presence and was accompanied by Miss Williams' running commentary of her reasons for acting as she did, there was nothing to have a hearing about. In any event, since Judge Gagliardi gave Miss Williams an opportunity to speak in her own defense before he held her in contempt (12-5-73 Tr. 53-54), entertained the motion Miss Williams made after being cited, and also accorded her and Mr. Kunstler a full opportunity to be heard before imposing sentence on January 3, Miss Williams received more than she was entitled to. *United States v. Galante*, *supra*, 298 F.2d at 76-79 (Friendly, C.J., concurring and dissenting); *Weiss v. Burr*, *supra*, 484 F.2d at 984-988. Were there any question whatsoever about the contemptuousness of Miss Williams' conduct it is inconceivable that she would not have raised it in this Court, and she has not.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the **15th** day of **May, 1974**
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

WILLIAM M. KUNSTLER, ESQ.
Center for Constitutional Rights
853 Broadway
New York, New York 10003

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordon III
JOHN D. GORDON, III

Sworn to before me this

15th day of ~~May~~, 1974.

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

